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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

—VS—

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER

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TYPE SETTERS PUB. CO., INC. TAMPA, FLORIDA

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REPLY BRIEF OF PETITIONER

The matter set forth on pages 29-31 of the Petition and pages 171-194 of the Appendix cannot be ignored, any more than the grant of certiorari by this Court in No. 477, *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al,* to which reference is made in Petitioner's Supplement to Petition, can be ignored. In the exercise of its certiorari jurisdiction this Court exercises a discretion in the public interest, and is not restricted to the common law rules of appellate review of controversies between particular litigants,[1] and the material to which Seaboard objects

[1]For which respondent cites *Holmes v. Trout,* 32 U.S. 171, 8 L.Ed 647 (1833), *Kerr v. Clampitt,* 95 U.S. 188, 24 L.Ed 493 (1877) and *Thompson v. Gaskill,* 315 U.S. 442, 63 Sup.Ct. 673, 86 L.Ed 951 (1942). The first two were decided prior to the Judiciary Act of February 13, 1925 (43 Stat. 936) and the third prior to the Act of June 25, 1948 (62 Stat. 869). See Mr. Justice Frankfurter's discussion of this Court's certiorari jurisdiction in the dissenting opinion in *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 79 Sup. Ct. 921, 3 L.Ed 2d 935 (1959).

be presented in either case and that there should be reversals in both cases, thus allowing the state courts to proceed, subject, of course, to this Court's ultimate review.

The flat statement on page 13 of the Seaboard's Brief for Respondent that "The state courts were not ousted of any jurisdiction" is difficult to follow. The Court of Appeals in No. 877 ousted of their jurisdiction both the one judge Federal district court (A. 25) and the state courts, the latter on the ground that their eminent domain proceedings under statutes in effect for one hundred years, were "in complete derogation of federal law" (A. 17).

In response to the charge in Respondent's brief that Petitioner's statement as to the relief sought by Seaboard in its Federal court action (Petition, p. 32) "is untrue but immaterial" (Brief of Respondent, p. 9), the full prayer for relief in Seaboard's Federal court action is printed as Appendix 1 hereto. There has at no time been any physical construction under way or threatened, and the relief sought by Seaboard, as a practical matter, was only and solely to put a stop to the proceedings in the state courts.

Petitioner has never agreed with the statement of the Court of Appeals that (A. p. 12) "There appears to be no serious question that an attempt to condemn lands * * * constitutes construction." It is too patent for argument that if the attempt is unsuccessful the attempt does not constitute construction, but the Court of Appeals was unwilling even to await the outcome of the attempt.

The Respondent seeks to lessen the force of *Texas & P. R. Co. v. Gulf C. & S. F. R. Co.*, 270 U.S. 266, 70 L.Ed 578 (1926) by saying that that case (Brief of

Respondent, p. 15), "* * * did *not* hold that an ICC order could be collaterally attacked or attacked at all other than by direct attack to a three judge court." This Court did hold, in that case, that the applicant lost no right to question the Commission's jurisdiction by applying to it, and the pertinent part of that opinion is printed as Appendix 2 hereto.

Respondent contends (Brief of Respondent, p. 12) that, "SCL did not institute the condemnation proceedings and did not ask the state courts to enjoin construction." Seaboard did ask the state courts to dismiss each of the condemnation actions on the same grounds Seaboard would have alleged if it had brought a §1(20) action in the state courts (R. 364, 496-497, and 513), and the argument that the same issue was not before the state courts because the Seaboard was not a plaintiff in a §1(20) action is but an exercise in semantics.[4]

Respondent contends, on page 15 of its brief, that the constitutional questions were not raised in the District Court, or before the Court of Appeals, until Tampa's petition for rehearing, and should not now be considered. The reason is obvious, as they were raised only by the opinion of the Court of Appeals, which went far beyond anything contemplated by the District Court, and the first opportunity at which these questions could be raised was in the Petition for Rehearing to the Court of Appeals.

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[4]The case of *St. Louis S. W. R. Co. v. Missouri P. R. Co.*, 289 U.S. 76, 77 L.Ed 1042 (1933) is of limited application because of the Arkansas statute. It began by an application to the Arkansas Commission and not by a suit in the state court.

CONCLUSION

The Petition for Writ of Certiorari in No. 877 should likewise be granted and in such event Nos. 477 and 877 should be argued and disposed of together.

Dated at Tampa, Florida
December 24, 1969

Respectfully submitted,

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APPENDIX 1

(Prayer for relief in Seaboard's complaint in the United States District Court, R. 24 and 25)

"Wherefore, plaintiff sues defendant and prays that the Court:

1. exercise jurisdiction of this action and the parties.

2. enjoin and restrain defendant, its officers, agents, servants, and employees during the pendency of this action and permanently, from continuing and maintaining condemnation proceedings against defendant in the Circuit Court for Polk County, Florida, or elsewhere, for the purpose of acquiring an interest in its property located in Polk County, Florida.

3. enjoin and restrain defendant, its officers, agents, servants, and employees, during the pendency of this action and permanently, from erecting, constructing, installing, maintaining or operating any railroad tracks, or any other facilities whatsoever in connection therewith.

4. Grant such other and further relief as may be just and proper.

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Tampa, Florida

(Signed) GEORGE C. WINN

Attorneys for Plaintiff"

APPENDIX 2

In *Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 70 L.Ed 578 (1926), this Court said (70 L.Ed 578, at 582):

> "A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track. * * *
>
> "The issue presented to the court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier. Compare *Smyth v. Asphalt Belt R. Co.*, 267 U.S. 326, 328, 329, 69 L.Ed 629-631, 45 Sup. Ct. Rep. 242. If the facts are agreed the question is one of law. If the facts are not agreed, the court must find them. In the case at bar, the district court, having jurisdiction generally of the parties and of the subject matter, was called upon to determine whether an allegation in the bill, essential to the cause of action, was established. This the court clearly had power to do. Moreover, even if the question presented were, as contended, properly one of jurisdiction, the objection urged could not prevail. Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist."

The opinion of the Court of Appeals in No. 877 denies to both the state courts and to the one judge Federal District Court the power even to determine whether the conditions essential to the exercise of their jurisdiction exist.

CERTIFICATE OF SERVICE

I DO CERTIFY that on this 24th day of December, 1969, one copy of the foregoing Reply Brief was furnished by mail to William A. Gillen, Esq., and one copy also by mail to James E. Thompson, Esq., both of Messrs. Fowler, White, Collins, Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/JAMES B. MCDONOUGH, JR.